

FOIA Litigation

*Everything you wanted to know but
were afraid to ask*

Receipt of Suit

- *Review complaint to make initial analysis of claims*
- *If component receives services directly, please contact DoD OGC*
- *Coordinate with OSD FOIA office and get a copy of their executive summary*
- *Call the civil division of the District where the case was filed and/or DOJ fed programs to find out who the AUSA is*

What is the suit about?

- *Generally, there are 4 reasons why suits are filed*
 - *Denial of expedited processing/fee waiver*
 - *We do not answer at all*
 - *Complaints over the adequacy of DoD's search/response*
 - *Complaints over the redactions taken*

What is the suit about?

Denial of expedited

processing

- *Some requesters ask DoD to grant expedited processing. If the FOIA office denies that request, a suit may be filed.*
- *Standard to grant expedited processing: can the requester can show an exceptional need or urgency for the info requested*
- *Admin determination made by FOIA office*

What is the suit about?

Denial of fee waiver

- *Many requesters must pay fees*
- *Standard for granting fee waiver: if disclosure would significantly increase public understanding about government operations/activities and is not primarily in the commercial interest of the requester*

Fee Waiver Considerations

- *In the past, DoD components have been inconsistent in how they processed fee waiver requests*
- *Requiring requesters to pay what the law allows usually leads to a more focused request and can reduce the likelihood of exceptionally burdensome searches*

Court decides EP/Fee Waiver issue

- *Cases resolved by motions practice*
- *If the court grants EP, then requester goes to end of EP queue*
- *If the court denies, they go to end of regular queue*
- *If the court grants fee waiver request, DoD must process*
- *If the court denies fee waiver request, we do not process without a prior commitment to pay, and do not provide docs without \$*

What is the suit about?

We Did Not Answer at All

- *This is becoming a much more popular tactic for frequent requesters*
- *File a request and close in time to the 20th day, file suit*
- *EFF*
- *ACLU*

What is the suit about?

Adequacy of Search

- *Agencies must conduct a search that is “reasonably calculated to uncover all relevant documents.”*
- *Must search everywhere it is reasonably likely that responsive records exist*
- *Were the correct components tasked?*
- *Are we satisfied that they conducted an adequate search, not only where they searched, but what they searched for?*
- *Olesky case*

Electronic Searches- Considerations

- *Do you need to search siprnet as well as niprnet?*
- *Do you need to search any shared drives or desktop files?*
- *Coordinate search terms with OGC in advance, if at all possible*

Bates Stamping

- *With the improvement of technology, Bates stamping can be done via Adobe 8*
- *Consider whether or not to assign Bates number ranges to different components so as to reduce confusion*
- *Dickstein*

Referrals/Consultation

- *Referrals-your file contains documents that originated with another agency.*
- *Consultation-your file contains documents that contain information that originated with another agency.*

Referrals/Consultation

- *Assume nothing. Components are inconsistent in how they refer the documents and then can forget them once they are out of sight*
- *This process almost always takes longer than expected. Build in enough time to meet any court deadlines.*

Referrals/Consultation

■ Logistics

- *Are the referrals going directly from component to component/agency or are they going through the OSD FOIA office?*
- *Who is going to respond to the requester?*
- *Advantages of going through the FOIA office is that you know where things are*
- *Disadvantages are that it can add time to the process*

What is the suit about?

What DoD redacted

- *At some point in the litigation process, plaintiff complains about the redactions that we have taken*
- *These issues are best resolved in our favor when you make sure that our positions are consistent across DoD and ensure that the redactions are supported by adequate Vaughn indices and Declarations*

Complaints over Redactions

- *FOIA requires that agencies review each document, line by line, to determine if there is non-exempt information that can be segregated out for release*
- *Courts are often interested in ensuring that the agency has complied with this requirement*

Redactions

- *Logistics:*
- *A clean copy of the documents should be bates stamped before redactions begin*
- *Redactions should be marked on the document with the FOIA exemption being claimed in the margin*

President's Memo

- *“A democracy requires accountability, and accountability requires transparency.”*
- *Clear Presumption of Disclosure*
- *“In the face of doubt, openness prevails.”*
- *Information should not be kept confidential merely because:*
 - *officials might be embarrassed,*
 - *errors and failures might be revealed, or*
 - *because of speculative or abstract fears.*

AG's Memo

- *Agencies will now be defended “only if*
- *(1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or*
- *(2) disclosure is prohibited by law*

AG's Memo

- *Records should not be withheld just because an exemption technically or legally might apply.*
- *Applying the “foreseeable harm” standard.*
- *Factors to consider in determining whether there is “foreseeable harm” from disclosure.*
- *For all records, the sensitivity of the document’s content and its age are universal factors that guide a decision to make a discretionary release.*

WH Chief of Staff Memo

3-16-10

- *Also, on his first full day in office, the President directed you to administer the Freedom of Information Act (FOIA) with a “presumption in favor of disclosure” and to respond to FOIA requests “promptly and in a spirit of cooperation.” Accordingly, we write to request that your agency take several specific steps to improve implementation of the President’s Memorandum on the Freedom of Information Act.*

WH Chief of Staff Memo

3-16-10

- *To that end, we request that you take action as follows to ensure full implementation of the President's Memorandum on FOIA. First, you should update all FOIA guidance and training materials to include the principles articulated in the President's Memorandum. Second, you should assess whether you are devoting adequate resources to responding to FOIA requests promptly and cooperatively, consistent with the requirements for addressing this Presidential priority.*

DOJ/White House Counsel Role

- *Greater interest in seeing what goes out before it goes out*
- *Typically request 2-3 weeks lead time before release*
- *Scheduled release dates*

B(1) exemption-examples

- *B(1)-exempts material that is currently AND properly classified*
- *Component comes back with a cursory explanation-everything is classified, or its all in our classified databases, so we are not producing it OR*
- *There is a reluctance to have OCA weigh in*

Compilation

- *Compilation/mosaic-providing apparently harmless pieces of information that can be cobbled together to reveal classified info*
- *Compilation is a valid reason to exempt info but it can be hard to explain in a Vaughn index and declaration*

B(2) exemption-examples

- *Low-DOJ will not support*
- *High-DOJ expects detailed explanation as to why material would allow the recipient to circumvent DoD rules and/or procedures*

B(3) exemption-examples

- *B(3)-exempts material that is identified by statute as being exempt from release*
- *10 USC 130(b) protects names of DoD personnel in overseas, sensitive or routinely deployable units*
- *Red Cross Material*
- *ACLU photos legislation*

Open FOIA Act of 2009

- *The Secretary of Defense may certify that disclosure of a photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States;*

Open FOIA Act of 2009

- *Covers photos taken September 11, 2001, through January 22, 2009 and which*
- *Relate to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States*

**CERTIFICATION OF THE
SECRETARY OF DEFENSE**

This certification pertains to a collection of photographs (as that term is defined in Section 565(c)(2) of the Department of Homeland Security Appropriations Act, 2010 (Pub. L. 111-83) ("DHS Appropriations Act")) assembled by the Department of Defense that were taken in the period between September 11, 2001 and January 22, 2009, and that relate to the treatment of individuals engaged, captured or detained after September 11, 2001 by the Armed Forces of the United States in operations outside the United States. These photographs are contained in, or derived from, records of investigations of allegations of detainee abuse, including the records of investigation processed and released in *American Civil Liberties Union v. Department of Defense*, 04 Civ. 4151 (AKH) (S.D.N.Y.). The photographs include but are not limited to the 44 photographs referred to in the decision of the United States Court of Appeals for the Second Circuit in *American Civil Liberties Union v. Department of Defense*, 543 F.3d 59, 65 & n.2 (2d Cir. 2008), petition for cert. filed, 78 U.S.L.W. 3083 (Aug. 7, 2009) (No. 09-160).

Upon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander of Multi-National Forces-Iraq, and by the authority vested in me under Section 565(d)(1) of the DHS Appropriations Act, I have determined that public disclosure of these photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.

Therefore, these photographs meet the standard for protected documents, as that term is defined in section 565(c)(1) of the DHS Appropriations Act and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C § 552, and in all proceedings pursuant to that law. As required by Section 565(d)(4) of the DHS Appropriations Act, I hereby direct that notice of this Certification be provided to Congress.

Date: 11-13-09


Secretary of Defense

B(5) exemption-examples

- *B(5)-Pre-decisional AND deliberative material OR*
- *Material that would be protected under civil discovery rules*
- *DOJ is less inclined to support our claims*
- *Loving/Gray cases*

B(6) exemption-Names Policy

- *We have been sued several times over this policy and have won each suit*
- *Most recent is an Army case:*
- *Schwaner v. Army (DC) (March 17, 2010)*

B(7) exemption-examples

- *B(7)-exempts law enforcement material found in “records compiled for law enforcement purposes, the disclosure of which would result in harm*
- *B (7) (f)-ACLU case*

Now what?

- *You've ensured an adequate search;*
- *You've taken the appropriate exemptions;*
- *A copy of the responsive documents have been provided to the plaintiff;*
- *How do you resolve the litigation?*

What standard does the court use?

- *In a FOIA case, the Court may grant summary judgment based on the information provided in an agency's supporting affidavits or declarations when they describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith."*

What standard does the court use?

- *The moving party bears the burden of demonstrating an absence of a genuine issue of material fact.*
- *Factual assertions in the moving party's affidavits may be accepted as true unless the opposing party submits his own affidavits, declarations or documentary evidence to the contrary.*

Vaughn Index and Declarations

- *All redactions must be described in a Vaughn index and supported by a declaration (similar to an affidavit)*
- *Such affidavits or declarations are accorded “a presumption of good faith, which cannot be rebutted by ‘purely speculative claims about the existence and discoverability of other documents.’”*

Vaughn index

- *Index must list all documents for which any redactions are taken and provide the basis of the redactions*
- *Index must be detailed enough for a judge who knows nothing about the case to decide whether or not the redactions are appropriate under the law*

Vaughn Index

- *New e-filing rules*
- *PDF have to be legible and on one page*
- *Language can not be general citing EO provisions*

Declarations

- *Identify declarant-why is this person signing?*
- *Set forth procedural history of request*
- *Describe search for responsive records*
- *Describe records (or portions) withheld*
- *Identify exemptions claimed and provide all required elements to claim that exemption*

Declarations

- *The declarations must describe all of the types of redactions set out in the Vaughn index and explain why they were taken*
- *Review sample declarations to get a sense of what needs to be provided*
- *Drafts need to be provided to the AUSA before they are signed. Invariably, there are numerous changes suggested by the AUSA*

Declarations

- *If a component is claiming that portions of the information is classified, a declaration will need to come from the Original Classifying Authority or his/her designee*
- *The OCA will need to state that they have reviewed the material and determined that it is still properly classified*

B (2) high-Declaration

- *Specifically, written descriptions of wounds and wound patterns, pictorial descriptions and sketches, photos, diagrams...were withheld from the... reports....*

B (2) high-Declaration

▪ *These written descriptions, sketches, diagrams, photographs, and radiological representations of wounds and wound patterns are detailed and specific. They show, among other things, the point of entry and exit of fatal wounds and the trajectory of bullets used to inflict fatal wounds. Release of this information absolutely would endanger all United States military service members undertaking operational missions anywhere in the world.*

B (2) high-Declaration

▪It would provide the enemy with information on the specific vulnerabilities of United States military personnel, including details on how to overcome personal protective equipment as well as the protective equipment provided on various armored vehicles. It would also allow our enemies to tailor or modify their tactics to avoid or circumvent the personal protective equipment worn by United States military personnel to inflict maximum damage.

B (2) high-Declaration

- *The information withheld from the responsive documents can reveal the lethality of enemy weapons and munitions. It provides precise, detailed information from the fatalities and demonstrates a clear and definitive diagrammatic exposition of exactly how to overcome United States military service members' personal protective equipment, including previously unknown vulnerabilities in military uniforms, personal protective equipment, and helmets.*

B (2) high-Declaration

- *Release of this detailed information on wounds and wound patterns would be particularly harmful in the aggregate. When viewed in the aggregate, the autopsy reports and related documents reveal commonalities among the causes and manner of death of soldiers and highlight definite patterns of vulnerability that would be apparent even to an untrained individual.*

B (2) high-Declaration

- *The contents of the autopsy reports and related documents in the aggregate would provide information our enemies can use to produce medical intelligence.*
- *Adversaries of the United States actively search various media for information that may allow them to exploit any weaknesses in personal protective equipment, uniforms, or vehicles.*

B (2) high-Declaration

- *It is known that our enemies even search open sources, including open medical sources, for photos, detailed descriptions, data collections, or professional analyses that may provide them with an advantage over United States military forces.*

B (2) high-Declaration

- *When these adversaries take medical information derived from the combat theater of operations and turn it into medical intelligence, they can use it to plan and conduct operations on a strategic and tactical level, and to assess the effectiveness of their operations and the fighting strength of United States military forces.*

B (2) high-Declaration

- *The release of such information collected from past fatalities will most certainly result in future fatal wounds in U.S. military personnel because of the specificity of the information.*

Communications

- *Between FOIA offices*
- *Between lawyers*
- *Between lawyers and FOIA offices*
- *Between DOJ and DoD*
- *Between DoD and other components*

OPEN Government Act of 2007

- *Section 4-Attorney Fees*
 - *Substantially prevailed if plaintiff obtained relief through either judicial order or enforceable written agreement or consent decree OR voluntary or unilateral change in position by the agency*
 - *Fees are now paid by agency funds, rather than DOJ claims and judgment fund*

FOIA Fees

- *New standard for plaintiff “substantially prevailing” established by OPEN Government Act of 2007*
- *“A judicial order or an enforceable written agreement or consent decree.”*
- *“A voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.”*

FOIA Fees

- *Assessed fees “shall be paid only from funds annually appropriated ...for the federal agency....”*
- *Who decides what is owed by whom?*
- *Where does the \$ come from?*
- *Status of efforts to clarify issues*